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No. 99-1466

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BARBARA GRASSINI,

Petitioner,

v.

DUPAGE TOWNSHIP, a Municipal Corporation, MARGARET DANHOF, Township Supervisor, ANN DRALLE, Trustee, FELIX GEORGE, Trustee, and JUDITH BREDEWEG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

The appeal from the trial court was not perfected as to Paul Drdak and Jeff Mertz and they were not properly included as Respondents.

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REASONS FOR DENYING THE WRIT

I.

THE APPELLATE COURT PROPERLY HELD THAT THE PETITIONER FAILED TO ALLEGE THAT THE TOWNSHIP DEPRIVED HER OF ANY CONSTITUTIONALLY PROTECTED ACTIVITIES.

This case does not warrant review by this United States Supreme Court. The Appellate Court of Illinois, Third District, gave Petitioner ample opportunity to state a claim for relief under 42 U.S.C. § 1983.

42 U.S.C. § 1983 creates " 'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities' secured to them by the Constitution." *Memphis Community School District v. Statura*, 477 U.S. 299, 305, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986). Petitioner's Section 1983 action fails because she has not suffered a deprivation. Further, the rights she seeks to protect are not secured by the Constitution, or have not been infringed. Even assuming that Petitioner has alleged a conspiracy by Respondents, Petitioner's due process and equal protection claims fail because Respondents took no steps in furtherance of an alleged conspiracy. Petitioner has, moreover, failed to allege the necessary elements of an equal protection claim.

The Petitioner alleged in her Amended Complaint that her due process and equal protection rights were infringed by an internal Township memo. (Petitioner's Appendix pp. 54-64) (hereafter as A-54-64) The memo stated that in light of Grassini's lawsuit against the Township arising out of its termination of her employment, she was "not allowed to participate in any paid or volunteer activity held on Township property." (A-62)

The Illinois Appellate Court found in its 1996 Opinion that Petitioner had not pled adequate facts to state a cause of action for a deprivation of her rights under the First and Fourteenth Amendments of the United States Constitution. (A-34) The Court held that Grassini failed to plead facts showing that her rights under federal law were infringed as a result of the policy in question. (A-34) To state a cause of action, Petitioner was required to plead, for example, that she was denied access to Township property despite her desire to use it, or that the Township threatened to enforce the policy, according to the 1996 opinion. (A-34)

The court remanded the case permitting Petitioner to replead. (A-34) The trial court dismissed the Amended Complaint. (A-39) In the Order before the Court, the Appellate Court affirmed, finding Petitioner had again failed to allege an actual deprivation of her rights. (A-39)

In order to state a cause of action under 42 U.S.C. § 1983 for violation of constitutional rights, a plaintiff must show an actual deprivation of the constitutional right by defendants. *Reichenberger v. Pritchard*, 660 F.2d 280, 281 (7th Cir. 1981). The *Reichenberger* court found the plaintiff's claim of "a presently actual threat of deprivation" to be insufficient. *Id.*

The Petitioner does not allege that any Respondent communicated a threat to her or took any action impacting her. She did not allege that she was denied access to the property or that the Township threatened to enforce the policy. Assuming that the allegations of the Complaint are that the Respondents developed a plan or conspiracy against Grassini, there is no allegation that the Respondents ever took a step in furtherance of the alleged conspiracy to Petitioner's detriment.

The gist of a cause of action under Section 1983 is the deprivation and not the conspiracy. *Rojicek v. Community Consolidated School District*, 888 F. Supp. 878, 884 (N.D. IL 1995). It is not enough for the plaintiff to prove the conspiracy without proving the deprivation as well. *Id.* An inchoate agreement, without more, does not result in a denial of rights. *Villanueva v. McInnis,* 723 F.2d 414, 418 (1984). Liability arises only when the execution of a government's policy inflicts an injury. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 611 (1978). Here, Petitioner did not allege an execution of the purported plan by the Respondents. The alleged plan was, at most, an inchoate agreement, and did not act to deprive Grassini of any rights.

This defect is fatal to each of Petitioner's claims, whether under due process or equal protection. An allegation that defendants conspired to deprive plaintiff of equal protection requires an actual infringement of a constitutional right. *Macko v. Byron*, 760 F.2d 95, 96 (6th Cir. 1985). *Esmail*, on which Petitioner relies, states, "If the power of government is brought to bear on a harmless individual merely because a . . . local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Esmail v. McCrane*, 52 F.3d 176, 179 (7th Cir. 1995). Here, the "power of government" was not brought to bear on Petitioner; the Township and individual Respondents never exercised their power in any way. There was no unequal treatment of the Petitioner, requisite to an equal protection claim, because the Respondents never took any step in furtherance of the alleged plan and therefore did not treat Petitioner unequally. No case has eroded the principle that some governmental action must be at the foundation of a constitutional challenge.

Grassini alleges that the Respondents threatened to enforce the memo through an employee of the Township. Grassini's Amended Complaint includes an affidavit by Suzanne Cox, who, according to the Amended Complaint, worked as a secretary for DuPage Township. The affidavit states, "That this Affiant told Barbara Grassini not to come onto Township property and that if she did, she would be stopped." (A-64)

The Appellate Court found Cox's statement was not the act of the Township or any individual Respondent. Attached to Respondent's Motion to Dismiss was the affidavit of Respondent, Margaret Danhof, stating the Township did not direct or authorize Cox to inform Grassini not to enter Township property. (C. Supp. Vol. IV) She states the memo was never directed to Petitioner and that the Township never requested or authorized any employee to provide a copy to Grassini. (C. Supp. Vol. IV) Suzanne Cox, who worked as a secretary, had no authority to enforce any Township policy regarding relations with former employees, including Barbara Grassini. She had no authority or permission to tell Barbara Grassini not to enter Township property, according to Danhof's affidavit.

The Appellate Court properly found that the Township is not liable for Cox's unauthorized actions. *Respondeat superior* liability will not suffice to impose Section 1983 liability on a municipality. It is only "when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may be fairly said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." *Monell v. Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 611 (1978). Recovery from a municipal

entity is therefore limited to acts that are, properly speaking, acts of the "municipality" — that is, acts which the municipality has officially sanctioned or ordered. *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 509 (7th Cir. 1993), *citing Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). The plaintiff must establish not only a policy, but also that the official policy maker's decisions caused the deprivation of rights at issue by policies that affirmatively command that it occur. *Id.*, 10 F.3d at 510. As stated by the Court, Petitioner did not allege that the decision makers commanded or authorized Suzanne Cox to inform Grassini of the memorandum. Their decisions did not result in a deprivation. (A-51-52)

Suzanne Cox, as a secretary, was not one whose edicts could represent official policy. This unauthorized conduct by an employee could not constitute an act by the Township, and the Township is not responsible for it. Under *Monell*, the Appellate Court properly found that DuPage Township is not responsible for Cox's actions.

II.

THE APPELLATE COURT PROPERLY FOUND THAT THE RIGHTS GRASSINI SEEKS TO PROTECT EITHER ARE NOT SECURED BY THE CONSTITUTION OR WERE NOT INFRINGED BY THE MEMO.

In any action under Section 1983, the first step is to determine the exact contours of the underlying right said to be violated. *Citizen's Action Fund v. City of Morgan City*, 154 F.3d 211, 214 (5th Cir. 1998). The initial issue is one of law — whether plaintiff's claimed rights are constitutionally protected. *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985).

Vague assertions of unfairness on the part of the government, without more, cannot be molded by the court into constitutional violations. *Mazza v. Hendrick Hudson Central School District*, 942 F. Supp. 187, 192 (S.D.N.Y. 1996).

Petitioner alleges that she was deprived of her right to volunteer at the Senior Services Center and to attend Township board meetings. She alleges the Board "policy is not to allow Barbara Grassini to participate in any paid or volunteer activity held on DuPage Township property." (A-56)

Attendance at a public meeting, however, is not a "paid or volunteer" activity and, therefore, was not within the meaning of the memo. Petitioner, thus, did not allege a deprivation of a claimed right to attend a board meeting based on the memo. The Appellate Court properly found that the memorandum does not support Petitioner's allegations that she was denied the use and enjoyment of Township property. (A-46) The Court properly found that the Petitioner has always been free to attend and participate in any public assemblies or activities on Township property of any designation . . . (A-48)

Petitioner claims her rights of free assembly and association, along with her First Amendment expressive activities, were infringed when she was "chilled" from volunteering at Senior Services events on Township property. (P. 11-12 of Plaintiff's Petition For Writ of Certiorari) The court found, however, Petitioner has no entitlement to work as a volunteer at the Township's senior services program, stating, "We have not uncovered any right to volunteer or be employed for social events at a government sponsored senior center." (A-47)

If a Section 1983 plaintiff does not have a protectable property or liberty interest, she is not entitled to the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment and her due process claim is properly dismissed. *Rojicek v. Community Consolidated School District*, 888 F. Supp. 878, 884 (1995). "To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 548 (1972).

According to the Danhof affidavit, the Township sponsors and funds the senior programs at the Joseph and Sarah Levy Senior Center. These programs provide activities for Township seniors. The Township funds these programs and provides facilities, such as a garden and rent-free use of its building. (C. Supp. Vol. IV).

A public employee has no property right in public employment, which falls within the protection of the due process clause of either the State or Federal constitution. *Levin v. Civil Service Commission of Cook County*, 52 Ill.2d 516, 288 N.E.2d 97, 100 (1972). Government enjoys the unrestricted power to determine those with whom it will deal. *Polyvend v. Puckorius*, 77 Ill. 2d 287, 395 N.E.2d 1376, 32 Ill. Dec. 872 (1979). The Court properly found Petitioner did not suffer an actionable deprivation if she were barred from acting as a volunteer at a Township sponsored center.

Petitioner claims a deprivation of loss of speech. However, an interest in holding a job, whether paid or volunteer, is not itself a free speech interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 2708, 33 L. Ed. 5-8 (1972).

The Appellate Court properly found Petitioner failed to state a claim for retaliation. (A-49-50) In order to state a claim for retaliation for exercising First Amendment rights by petitioning the government for redress of grievances, a plaintiff must allege that the complaint touched upon matters of public concern. *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir. 1995). In *Lashbrook*, the court found that plaintiffs failed to state a claim for retaliation for plaintiff's prior law suit that challenged on due process grounds the defendant's firing of plaintiff and claimed the existence of a contract between the parties. The court held that a dispute between an employer and employee is not necessarily a matter of public concern, especially where the employee's complaint is entirely personal in nature. The court held that the complaint failed to state a cause of action because the civil suit was not an effort at whistle blowing or some other matter of concern to the public generally, but was rather concerned with plaintiff's private contractual dispute with the park district. This is consistent with the United States Supreme Court's finding that litigation, where it is used as a means of achieving equality for a particular group, and not merely as a means of resolving private disputes, constitutes a form of political expression. *NAACP v. Button*, 371 U.S. 415, 432, 85 S. Ct. 328 (1963). The litigation between the Petitioner and the Township was merely a private dispute and was not protected political expression.

Here, as in *Lashbrook*, the initial dispute between Petitioner and the Respondent was entirely personal to the Petitioner and revolved around whether she was properly terminated. As in *Lashbrook*, she contended the firing was in violation of a valid contract and that she was denied due process. The Illinois courts ruled against Petitioner on these issues. There were no matters of public concern in the case, such as whistle blowing. Therefore, Petitioner has failed to state a cause of action for retaliation, under *Lashbrook*.

Petitioner argues that although Respondents did not deny her access to Township property, she was chilled in exercising her constitutional rights. The Order did not discuss whether Petitioner's claim that she suffered a chilling effect constitutes a deprivation and did not discuss whether Petitioner waived the issue. Petitioner, however, waived the issue in the Appellate Court and it has not been preserved for review.

Petitioner cited no authority in the Appellate Court for the proposition that the allegation of a chilling effect states a cause of action for a deprivation of rights under Section 1983. She cited only *NAACP v. Button*, which does not address the issue whether such an allegation states a cause of action under Section 1983. 371 U.S. 415, 432, 85 S. Ct. 328 (1963). In *Button*, the Supreme Court found that a judicial decree could be reversed if it prohibited privileged exercises of First Amendment rights, whether or not the record disclosed that the petitioner had engaged in such conduct. 371 U.S. at 432. The case is not applicable to the issue whether Section 1983's requirement of a deprivation or denial of a right is satisfied by the allegation of a chilling effect on Plaintiff's exercise of rights.

Citation of authority is required under Illinois Supreme Court Rule 341(e)(7). An appellate argument without citation to relevant authority is waived. *Rheinheimer v. Village of Crestwood*, 291 Ill. App. 3d 462, 684 N.E.2d 777, 225 Ill. Dec. 786 (1st Dist. 1997). The Petitioner failed to address in the Appellate Court whether her allegations of a chilling effect are sufficient under Section 1983 to constitute a denial of rights, even though the trial court dismissed the Complaint for its failure to allege a deprivation. This issue has been waived under Illinois law, and has not been preserved for review.

III.

THE ILLINOIS COURTS PROPERLY DISMISSED PETITIONER'S EQUAL PROTECTION CLAIM.

Petitioner claims that the memorandum violated her equal protection rights, under *Esmail v. Mc Crane*, 52 F.3d 176 (7th Cir. 1995). She, however waived the argument in the trial court. The Amended Complaint, in enumerating the rights Petitioner claimed were violated, listed "equal protection." However, although Respondent's Motion to Dismiss sought dismissal of the entire Complaint, Petitioner never asserted in the trial court that her equal protection claim was viable. Her Response to the Motion to Dismiss did not refer at all to equal protection. (C217-218) She failed to bring the issue to the attention of the trial court. An objection to a Motion to Dismiss which is not raised in the trial court cannot be raised on appeal. *In Re: Marriage of Wilson*, 193 Ill. App. 3d 473, 549 N.E.2d 1348, 140 Ill. Dec. 476 (1990). Petitioner's equal protection claim was, therefore, waived under Illinois law. This issue has not been preserved for review.

Petitioner's Complaint is deficient, moreover, because she fails to make the requisite allegations for an equal protection claim. To state a cause of action for an equal protection claim, a plaintiff must allege that she has been treated differently from others similarly situated. *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000). To recover under the rationale of *Esmail*, an allegation that plaintiff was treated differently from others similarly situated is necessary. *Pleva v. Norquist*, 36 F. Supp. 2d 839, 850 (E.D. Wis. 1999) *citing Esmail v. Mc Crane*, 52 F.3d 176 (7th Cir. 1995). Here, the Petitioner does not allege that she was treated selectively, and therefore her equal protection claim fails.

Petitioner relies on the case, *Esmail v. Mc Crane*, 52 F.3d 176 (7th Cir. 1995), for her equal protection claim. There plaintiff alleged that the Mayor of Naperville denied equal protection by denying plaintiff's liquor license applications on the basis of trivial or trumped-up charges while maintaining a practice or policy of granting licenses to people who had engaged in similar conduct. The harassment consisted not only of denying the application for a liquor license, but also harassing the plaintiff and his employees with constant, intrusive surveillance; in causing the police to stop his car repeatedly; forcing him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him. The court referred to this as "an orchestrated campaign of official harassment directed against him out of sheer malice." The court stated, "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." 52 F.3d at 179.

The Petitioner does not allege "a malignant animosity" by Respondents, an essential element in *Esmail v. Mc Crane*, 52 F.3d 176, 179 (7th Cir. 1995). Similarly, Petitioner does not allege that Defendant harbored "substantial ill will" toward Petitioner, as in *Village of Willowbrook v. Olech*, 160 F.3d 386, affirmed, 120 S. Ct. 1073 (2000). Plaintiff fails to state a cause of action. The Appellate Court properly affirmed the trial court's dismissal of Petitioner's Amended Complaint.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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